Supreme Court, U.S.
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No. 03-300

IN THE

Supreme Court of the United States

SAN DIEGO ASSOCIATION OF REALTORS, ET AL.,
Petitioners,

v.

ARLEEN FREEMAN AND JAMES ALEXANDER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF

The Ninth Circuit has condemned as classic price-fixing an agreement between joint venturers on the price that their venture would pay for services that concededly are necessary to support a procompetitive new product. The petition demonstrates that the Ninth Circuit's decision conflicts with decisions of the First and Seventh Circuits. Those circuits refuse, as a matter of law, to employ the per se rule to condemn pricing agreements among venturers for services or other inputs that are necessary to bona fide joint ventures.

The petition also demonstrates that the Ninth Circuit's decision subverts the express policy of the Federal Trade Commission and the Department of Justice (the "Agencies") to eliminate the perception that the antitrust laws are hostile to procompetitive, integrated competitor collaborations. The Ninth Circuit, in contrast, ignored the principles set forth in the Agencies' *Collaboration Guidelines*,[1] and relied upon older joint venture decisions, including *United States* v. *Topco Associates*, 405 U.S. 596 (1972), *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), and *Arizona* v. *Maricopa County Medical Society*, 45 U.S. 332 (1982), in rigidly applying the per se rule. Thus, the decision is inconsistent with the trend in this Court's more recent antitrust cases to require a "more extended examination" than the per se rule permits, *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 779 (1999), and with the recognition by some courts of appeals that *Topco*'s rigid application of the per se rule to an agreement that, at most, restrains competition created by a procompetitive joint venture, may no longer be "good law."[2]

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[1] Fed. Trade Comm'n & Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000).

[2] *Massachusetts Food Ass'n* v. *Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 564 n.2 (1st Cir. 1999).

The FTC recently confirmed that there is no issue "more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals."[3] Uniformity in the application of Section 1 to joint ventures is thus of paramount economic importance. Consequently, this petition satisfies this Court's criteria for plenary review. Respondents oppose this petition by attempting to create factual disputes and to distinguish these conflicts, but their objections are contrived and unpersuasive.

1. Respondents' first factual argument is that they have never conceded "that fixed prices were necessary." Opp. 5. But petitioners rely only upon what respondents, like the Ninth Circuit, expressly concede – that the *support services* themselves are a "necessary" part of the new countywide MLS. See *id.* ("support services and their attendant prices were necessary"); Pet. App. 3a (Ninth Circuit acknowledges that support services are "necessary" to new MLS); see also Pet. 4-5. Because the challenged pricing agreement concerned the price of inputs "necessary" to produce the joint venture's finished product (here, a new countywide MLS), the pricing agreement for those inputs should have been viewed as part and parcel of the unquestioned right of a joint venture to set a price for the new product it created, and hence lawful. At the very least, the challenged agreement should have been considered reasonably ancillary to the joint venture and hence not unlawful per se.

Respondents next argue that petitioners "adopt a theory that received only scant attention in either of the lower courts, and is supported by no admissible evidence." Opp. 6. This claim is false. The core "theory" of the petition is that the challenged agreement is lawful and may not be condemned as unlawful per se. That theory was discussed at length by the

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[3] *Polygram Holding, Inc.*, No. 9298, slip op. at 2 (F.T.C. July 24, 2003) (opinion), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf.

Court of Appeals (Pet. App. 22a-28a), and has been petitioners' view from day one.

Respondents also argue that there is no "evidence that Sandicor would never have come into being without fixed support prices." Opp. 7. This claim is both mystifying and irrelevant. It is mystifying because respondents' principal witness asserted the point in his declaration,[4] and because the District Court overruled objections to a declaration by an individual defendant that respondents concede supports the point.[5]

Even if there were some genuine factual dispute on this issue (and there is not), the Ninth Circuit's sweeping application of the per se rule ensures that it will never be resolved. The Ninth Circuit assumed that there was evidence to support "the claim that price fixing was justified to convince the smaller associations to join the countywide MLS" and rejected that argument *as a matter of law*, holding that summary judgment "should have" been entered for plaintiffs. Pet. App. 24a, 24a-28a, 35a. A remand, thus, will not lead to any further development of the record on the issue presented here.

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[4] *See* E.R. 164, 176 (Decl. of Ed Tyson in Support of Motion for MLS Class Certification) ("The three groups [Fallbrook, Valley Center, and South Bay] said that if they didn't get a high price, they wouldn't join the MLS. That was a real concern to the rest of us, because if the associations opted out, then it wouldn't be a truly regional MLS.").

[5] The district court "overruled" (Pet. App. 77a) (capitalization omitted) respondents' objections to several declarations (including defendant Alkire's) insofar as the district court relied upon them. The district court relied upon the very paragraphs (¶¶ 38, 41) of the Alkire declaration that respondents concede (at Opp. 7) are evidence that the pricing agreement was important to the formation of Sandicor. *See* Pet. App. 40a (citing Alkire Decl. ¶¶ 22-42); 41a (citing Alkire ¶ 38); 64a (citing Alkire Decl. ¶¶ 23-42)); *see, e.g.*, ER 971-72 (Alkire ¶ 38) ("Many of the smaller and mid-sized boards of Realtors would simply not have joined in a countywide MLS on terms that would have spelled their demise.").

In any event, no futher factual development is needed. To prevail under Section 1, it is sufficient for petitioners to demonstrate either that setting a price for support services was an integral part of setting the price for the new MLS service itself,[6] or that obtaining the support services from the associations at a fixed per-capita price was a reasonable way for petitioners to provide to the venture what all concede was a necessary input.[7] The "uncontested" (Pet. App. 3a n.1) facts amply support either finding.

2. Respondents also state (Opp. 8-10) that the petition should be denied because the case has not been finally decided. But respondents offer no reason why the interlocutory posture of this particular case should affect this Court's exercise of discretion, and there is none.

It is well-established that "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation."[8] The issue here is an important one on which the circuits are divided. The Ninth

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[6] *See* Pet. 13-14 & n.5. Respondents thus err in suggesting that "Petitioners do not pursue this issue [*Copperweld* immunity] in their petition." Opp. 19. The question presented is broadly framed, and permits arguments derived both from *Copperweld* and from rule of reason cases to explain why the per se rule was misapplied here and why the challenged agreement was lawful under Section 1.

[7] *See* Pet. 14, 16 (*citing, inter alia, Collaboration Guidelines* § 3.2).

[8] R. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002); *see id.* §§ 2.2, 2.3; *see, e.g., Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170 (1994) (granting certiorari following court of appeals' reversal of grant of summary judgment in securities case "to resolve the continuing confusion over the existence and scope of § 10(b) aiding and abetting action"); *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992) (granting certiorari following court of appeals' reversal of grant of summary judgment in antitrust case "[b]ecause of the importance of the issue").

Circuit's decision also undercuts the express policy of the two federal agencies with principal responsibility for enforcing the Sherman Act. The importance of the issue thus warrants review.

There is also only cost, and no benefit, to delay. The Ninth Circuit's remand will not lead to further factual development that will assist the Court in reviewing the question presented; the Ninth Circuit cut that off by holding that summary judgment should have been granted for plaintiffs on this issue. The Ninth Circuit's erroneous decision will also have "immediate" and adverse consequences for petitioners.[9] Rather than affirming the district court's entry of summary judgment, which would have ended six years of meritless federal and state litigation – and which itself significantly deters procompetitive collaboration – the Ninth Circuit now requires petitioners and the lower courts to expend additional resources on such issues as damages, attorneys fees, injunctive relief, and altering the structure of the joint venture, all of which would be avoided if the Ninth Circuit's judgment is reversed.

3. Respondents fail to refute petitioners' showing that the Ninth Circuit's decision conflicts with decisions of the First and Seventh Circuits. Respondents argue broadly that these circuits' decisions "are entirely inapposite" because the Ninth Circuit concluded that the "'fixed support fee is not reasonably ancillary to the combined MLS database.'" Opp. 10-11 (quoting Pet. App. 24a). The argument misses the point. Neither the First nor the Seventh Circuit would have isolated a pricing agreement for a "necessary" (Pet. App. 3a) element of a new joint venture from the rest. Confronted with a pricing agreement for support services necessary to a legitimate, efficiency-enhancing integrated joint venture, they would have rejected a per se challenge.

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[9] *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam); *see* Stern, *supra*, § 4.18, at 259 (citing other cases).

The First Circuit made that abundantly clear in *Augusta News Co.* v. *Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001). The court refused to entertain a per se challenge to a stark pricing agreement among horizontal competitors (for per-store fees paid to third parties) because the agreement was part of "a bona fide joint venture." *Id.* at 49; see *id.* at 47 (fee agreement "might be a *per se* violation" if "unconnected to any joint venture"). The First Circuit would have reached the same result here, because (on the Ninth Circuit's own factual recitation) the creation of the new countywide MLS was a bona fide joint venture and the challenged agreement was for inputs not only "connected to" but *necessary* to the new product.

Respondents tortured answer to *Augusta* (Opp. 12-13 & n.3) only confirms the conflict. Respondents try to recharacterize *Augusta* as a case that endorses the per se rule because *Augusta* has a "favorable citation" to a footnote in *Addamax Corp.* v. *Open Software Foundation, Inc.*, 152 F.3d 48 (1st Cir. 1998). That footnote, in turn, supposedly endorses the per se rule for all agreements "'considerably broader than necessary to make the joint venture work.'" Opp. 12 (quoting *Addamax*, 152 F.3d at 52 n.5).

This is nonsense. Respondents' contrived reading is belied by the obvious fact that in neither *Augusta* nor *Addamax* did the First Circuit ever consider whether the challenged agreement was "considerably broader than necessary to make the joint venture work." The court held instead that such an inquiry was germane only to a *rule of reason* challenge.

Thus, *Augusta* cites to footnote 5 of *Addamax* for the point that collaborating "beyond the necessary scope of the venture" is one basis for condemning an agreement "under the rule of reason." *Augusta*, 269 F.3d at 48. Similarly, in *Addamax*, the Court stated in text that agreements "as to the price at which [the joint venture] will purchase inputs" are evaluated "under the rule of reason." 152 F.3d at 52. The appended footnote 5 then reflects the Court's effort to

reconcile that holding with *Topco* by offering its view of how *Topco*'s rigid per se rule "would probably be explained today." *Id.* at 52 n.5.[10]

Respondents also contend that *Addamax* is distinguishable because it involved a joint venture's agreement on "a price it would pay," while petitioners "agreed on a price they would charge." Opp. 13. This is word-play. Petitioners' agreement may also be described as one for the "price it [Sandicor] would pay" for needed services. Both here and in *Addamax*, plaintiffs challenged an agreement among competitors to set an allegedly non-competitive price for an input (here, overhead; in *Addamax*, software) that was necessary for the joint venture's new product. The First Circuit unequivocally rejected such a per se challenge as a matter of law. *Addamax*, 152 F.3d at 50-52. *Augusta* and *Addamax* thus each confirm that the First Circuit would not have condemned the support service agreement as unlawful per se.

Respondents do not attempt to distinguish the Seventh Circuit's decisions in either *Polk Brothers, Inc.* v. *Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985) or *Chicago Professional Sports Limited Partnership* v. *National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996), on their own terms. See Opp. 14. Rather, respondents claim that the Ninth Circuit's decision is consistent with the holdings in two other Seventh Circuit cases, *Premier Electrical Construction Co.* v. *National Electrical Contractors Ass'n*, 814 F.2d 358 (7th Cir. 1987), and *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984). But *Premier Electrical* is obviously distinguishable from this case, and *General Leaseways* expressly acknowledges "tension" in this

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[10] *Cf. Massachusetts Food Ass'n* v. *Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 564 & n.2 (1st Cir. 1999) (*citing Addamax*, and noting that "*Topco* may no longer be good law for its broader proposition that such a restraint [market division] is condemned *per se* even where it is ancillary to a productive joint venture.").

Court's precedent that underscores the need for plenary review.

In *Premier Electrical*, the Seventh Circuit, employing "a strong presumption in favor of the Fourth Circuit's disposition" of a related labor case, condemned "a naked agreement on price" as per se unlawful. 814 F.2d at 368, 371. That labor agreement, however, was not for services necessary to any joint venture's creation of a new product. Rather it was a trade association's effort to manipulate a union contract to raise the labor costs of non-members of the trade association. *Id.* at 368-71.

In *General Leaseways*, the Seventh Circuit applied both the per se rule and alternatively the rule of reason to uphold entry of a preliminary injunction. The court discussed at some length the "tension" (744 F.2d at 593) between the Court's decisions in *Topco* and *Sealy* strictly to enforce the per se rule, and the Court's subsequent decisions to apply the rule of reason in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), and *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979). Although it concluded that the per se rule should govern that case, the Seventh Circuit acknowledged that "it is possible that we are wrong" in that holding, and hence chose to "decide also whether, if the case were governed by the Rule of Reason, we would still have to uphold the preliminary injunction on the present record." *General Leaseways*, 744 F.2d at 596. Thus, nothing in *General Leaseways* remotely suggests that the Seventh Circuit today would abandon rule of reason analysis altogether, as the Ninth Circuit did, and exclusively apply the per se rule to an agreement setting a price for an input necessary to the creation of a procompetitive new product. If anything, the Seventh Circuit's acknowledgment of "tension" in this Court's decisions supports the need for plenary review.

4. Respondents conclude their opposition by briefly asserting that the Ninth Circuit's decision was "right on the merits." Opp. 18 (capitalization omitted). Their principal

claim is that the Ninth Circuit "indulged petitioners with what amounts to a rule of reason analysis." *Id.* at 20. This is not true. The Ninth Circuit offered only an explanation of why it did not *need* to engage in a rule of reason analysis. See Pet. App. 22a-28a. At no point, for example, did the Ninth Circuit balance the procompetitive effects of the new countywide MLS against the anticompetitive effects of an agreement setting the price for obtaining the overhead and support necessary to provide that new product.[11]

Respondents also fail to address the core errors in the Ninth Circuit's analysis. By following a *Topco*-like approach that divorced the pricing agreement from the joint venture that it supported, the Ninth Circuit's decision is "antithetical to the modern antitrust jurisprudence that began shortly after *Topco*."[12] Where the challenged restraint affects at most only the price of a new jointly produced product, and does not alter the price of any product that the venturers independently provide, it is absurd to condemn that restraint as "unlawful per se" without regard to the procompetitive benefits of the joint venture.[13]

The Ninth Circuit's per se condemnation of this agreement thus reinforces the perception that the antitrust laws are

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[11] *Compare* Pet. App. 22a-28a, *with General Leaseways*, 744 F.2d at 591-96 (explaining why per se rule, rather than rule of reason, should govern), *and id.* at 596-97 (providing rule of reason analysis in the alternative).

[12] T. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of* Massachusetts Board, 66 Antitrust L.J. 773, 796 (1998). The author, now chairman of the Federal Trade Commission, wrote the article cited here in his individual capacity.

[13] *Cf.* G. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 710-11 (1998) (criticizing *Topco* because "[p]er se treatment is not appropriate for a restraint on competition created by a joint venture."). The author, Director of Research for the Economic Analysis Group, Antitrust Division, U.S. Department of Justice, did not purport to express the views of the Department. *See id.* at 701 n.*.

hostile to efficiency-enhancing, integrated collaborations that the Agencies, in their *Collaboration Guidelines*, seek to dispel. It also conflicts with decisions in at least two circuits to reject per se analysis of pricing agreements for inputs or services reasonably connected to legitimate joint ventures. These conflicts, in turn, reflect longstanding tension, acknowledged by several courts of appeals, in this Court's joint venture cases. The lack of uniformity and uncertainty in this area of acknowledged national importance fully warrants this Court's review.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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